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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 320

LINCOLN ELECTRIC COMPANY, APPELLANT

v.

JAMES V. FORRESTAL

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MOTIONS OF APPELLEE TO DISMISS OR AFFIRM

These motions are filed by the appellee pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement as to Jurisdiction and other papers filed by the appellant, which urge this Court to review on appeal the judgment entered by the court below.

This action was commenced by appellant in the District Court of the United States for the District of Columbia to enjoin appellee, and his predecessor as Secretary of the Navy, from collecting the amount of "excessive war profits" determined under the Renegotiation Act to have been realized by appellant. A specially constituted three-judge court was convened pursuant to the

Act of August 24, 1937 (c. 754, Sec. 3, 50 Stat. 751, 752, 28 U. S. C. 380a). On July 14, 1947, the court handed down its opinion sustaining appellee's motion for a summary judgment and dismissing the complaint on the ground that the case was controlled by the decisions of this Court in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, October Term 1946, No. 95, and *Wade* v. *Stimson*, October Term 1946, No. 724, both decided June 16, 1947. Appellant's petition for appeal was allowed by the District Court on August 12, 1947.

STATEMENT OF FACTS

Appellant is an Ohio corporation engaged in the business of manufacturing and selling standard commercial arc welding electrodes, motor generator welding machines, and supplies (Stipulation, Vol. I, par. 2, p. 1).[1] On October 23, 1943, the Acting Secretary of the Navy, acting pursuant to authority delegated under Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended, found that the profits realized by appellant on its renegotiable contracts and subcontracts for the year 1942 were excessive in the amount of $3,250,000 (*id.*, par. 34, pp. 11–12). By letter of the same date, the Act-

[1] The evidence before the District Court consisted largely of that contained in a (printed) stipulation filed July 16, 1946, and hereinafter referred to as "Stipulation." Other stipulations filed by the parties are identified by reference to the date filed.

ing Secretary advised appellant that unless it took action to eliminate such excessive profits by November 5, 1943, the Secretary would direct the withholding of sums otherwise due appellant by the Government and by prime contractors of the Government (*id.*, par. 34, p. 12). On January 13, 1944, after this action had been instituted, the Secretary further advised appellant that he did not propose to direct the withholding of amounts due appellant by prime contractors with the Government (Stipulation, Vol. III, pp. 152–153). The letter stated:

> The elimination of the amount of your excessive profits, remaining after the allowance of the tax credit under Section 3806 of the Internal Revenue Code, can, it is believed, be accomplished by directing the withholding of amounts otherwise due to you by the Government. I find that it will be appropriate to eliminate the excessive profits, without further notice to you, by that method. I do not propose to eliminate such excessive profits by directing the withholding of amounts otherwise due to you by prime contractors with the Government. You are accordingly so advised.

The Secretary's finding was made after informal hearing before the Navy Price Adjustment Board on September 24, 1943 (Stipulation, Vol. III, pp. 124–141) and opportunity, not availed of, to submit to the Secretary any additional in-

formation or contentions which appellant deemed material (*id.*, pp. 142, 146).

The evidence submitted by appellant to the Board[2] showed that its total sales had increased from $9,884,643.48 in 1939 to $33,515,444.92 in 1942 (Stipulation, Vol. I, Exh. 5, p. 29; Vol. III, p. 41); that its profits before Federal income taxes in the same period had jumped from $2,459,973.84 in 1939 to $9,007,512.87 (*ibid.*); and that, notwithstanding the several fold increase in its volume of business, appellant's percentage of profit to sales did not decline but rather increased during the same period (*ibid.*). The products sold by appellant

[2] The voluminous evidence considered by the Secretary (Stipulation, Vol. III) consisted almost entirely of (1) data submitted by appellant and testimony of Mr. Lincoln, president of the appellant company, bearing on appellant's costs and profits and its contention of superior efficiency, and (2) a report of the Bureau of Ships, Navy Department (*id.*, pp. 15–18) on the comparative efficiency of appellant and its competitors, copy of which was sent to appellant before the hearing (*id.*, p. 18).

The only other matters before the Secretary were statements made at a meeting of the Board held during a recess in the hearings of September 24, 1943, and not attended by appellant (Stipulation, Vol. III, pp. 136–137). At this meeting, the Board took note of the rate of profits allowed certain of appellant's competitors in other renegotiation proceedings, but did not consider any of the evidence on which such allowances had been made (*id.*, p. 136). Statements were also made on the same occasion as to appellant's refusal to take direct Government orders and the results of certain quality tests of appellant's products (*id.*, pp. 136–137). The Board did not purport to consider these statements, however; the Board listed in open hearing the factors which it had considered, both favorable and unfavorable (*id.*, p. 138).

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during 1942, according to appellant's own evidence, were standard commercial articles in use before the war involving no novel manufacturing methods (Stipulation, Vol. I, par. 10, p. 3; *id.*, Vol. III, p. 6), and appellant's capital investment from 1939 to 1942 remained substantially unchanged (Stipulation, Vol. I, Exh. 2, p. 23; Vol. III, p. 41).

Appellee treated $21,481,728 of appellant's sales during 1942 as renegotiable. These included certain sales entered into prior to April 28, 1942 (the date the Renegotiation Act was first enacted); sales to the Treasury Department prior to October 21, 1942 (the date the Act was retrospectively amended to name the Treasury Department as a renegotiating agency); sales in 1942 to Defense Plant Corporation and its contractors and subcontractors; sales on contract in amounts of less than $100,000; and sales to many purchasers other than agencies of the United States, both prior and subsequent to the retrospective amendment of October 21, 1942, legislatively defining "subcontracts" subject to renegotiation (Stipulation, Vol. I, par. 29, pp. 9–10). Appellant did not expressly agree to the renegotiation of any contract executed or accepted by it in 1942 and, after July 1, 1942, usually so stated in its acceptance of purchase orders (Stipulation, Vol. I, par. 26, pp. 7–8).

On February 25, 1944, the Renegotiation Act was amended by Section 701 of the Revenue Act

of 1943, which, among other things, vested exclusive jurisdiction in the Tax Court to determine excessive profits upon the filing of application therefor within 90 days after passage of the Revenue Act of 1943, by any person aggrieved by a unilateral order of the Secretary for a fiscal year ending prior to July 1, 1943. Appellant has never filed such application (Stipulation, filed October 16, 1946).

The bill of complaint, as originally filed on November 3, 1943, sought injunctive relief against the enforcement of the Renegotiation Act "on the ground that said Act is repugnant to the Constitution of the United States" (Complaint, par. 4). The amendments to the bill, filed pursuant to leave granted on October 16, 1946, long after the enactment of the Revenue Act of 1943, further alleged that the Secretary had exceeded his statutory authority in issuing the order in controversy (Complaint, par. 33a).

After answering, appellee moved for summary judgment on the ground, among others, that the suit was one against the United States and the court lacked equitable jurisdiction because the appellant had failed to exhaust its administrative remedies and had an adequate remedy at law. The District Court denied the motion on August 2, 1944. At the instance of the court, the parties entered into a partial stipulation of evidence, which was filed in July 1946.

On October 16, 1946, both parties moved for judgment, and on July 14, 1947, the District Court granted the appellee's motion and dismissed appellant's complaint, on the authority of *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* October Term, 1946, No. 95, and *Wade* v. *Stimson,* October Term, 1946, No. 724.

Appellant did not press its original application for a temporary restraining order or for an interlocutory injunction, on appellee's agreement not to execute or enforce the order determining excessive profits "pending the final determination of this cause" (Stipulation, Pars. 37–38, p. 13). The United States has therefore not collected any part of the excessive profits determined to have been made by appellant. There has been no withholding by the United States, on account of the appellee's excessive profits determination, of any amounts owing to appellant by the Government, nor has the Government ordered any of its contractors or subcontractors to withhold any sums owing to appellant. No bond has been required of appellant during the course of this litigation. The record shows that as of May 31, 1946, the United States owed appellant only $4,641.62 (Stipulation, Exhibit 37, p. 99), and the amount at present is probably less, if anything is owing at all. No suit has been brought against appellant to collect the amount of the excessive profits.

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DISCUSSION

This case is wholly governed by *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra; Wade* v. *Stimson, supra; Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; and *Coffman* v. *Breeze Corps.*, 323 U. S. 316. In the light of those decisions, the questions raised here are so unsubstantial as not to warrant further argument. It is submitted that the decision below should be affirmed, or the appeal dismissed.

1. *Appellant has failed to pursue its remedy in the Tax Court.* *Aircraft* and *Wade* held that a war subcontractor, such as appellant,[3] seeking equitable relief against enforcement of a renegotiation order on the ground that the Renegotiation Act was both unconstitutional and inapplicable, was not entitled to invoke equity jurisdiction where he had neither exhausted his administrative remedy in the Tax Court nor pursued his adequate legal remedy of suit against a customer withholding sums pursuant to Government order. The instant case differs only in that suit was begun here before the Renegotiation Act was amended to establish the Tax Court remedy, and that appellant elected not to petition the Tax Court for redetermination. Neither of these dif-

[3] Appellant is also a contractor directly with the Government, and to that extent this suit is indisputably one against the United States. See *infra*, pp. 15–16.

ferences serves to mark off this case significantly from the *Aircraft* and *Wade* cases.

a. The Revenue Act of 1943, effective February 25, 1944, establishing Tax Court redetermination of excessive profits, was expressly made applicable to pre-existing renegotiation determinations, as well as to later orders; the statute gave contractors who had previously been renegotiated ninety days after February 25, 1944 to institute proceedings in the Tax Court, thus giving them the same status as contractors subsequently renegotiated (Section 403 (e) (2)).[4] Appellant, however, chose not to avail itself of this remedy which would, if the Tax Court had decided in its favor, have terminated all occasion for judicial action.

b. Appellant argues, however, that its suit was instituted in November 1943, prior to the enactment of the Revenue Act of 1943, and that equitable cognizance was not lost because of the later establishment of the Tax Court procedure. The

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[4] Section 403 (e) (2) provides in part as follows:

"Any contractor or subcontractor * * * aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with the Tax Court of the United States for a redetermination thereof * * *."

District Court's final opinion flatly rejected this contention and held that "The plaintiff had its opportunity to pursue its administrative remedy and failed to take advantage of it." This is clearly correct. The issue here is not merely the existence of an adequate remedy at law so as to preclude the commencement of an equitable suit. Congress has expressly established the requirement of administrative redetermination, and "Congress' commands for judicial self-restraint in this respect are not lightly to be disregarded." *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* slip opinion, p. 20. The Tax Court remedy was undeniably extended to appellant by Congress, and equally as exclusively as to other 1942 and 1943 determinations of excessive profits. In the absence of a saving clause for pending litigation, a statute conferring on another agency exclusive jurisdiction of causes previously within the jurisdiction of the federal courts deprives those courts of jurisdiction in pending cases. *Smallwood* v. *Gallardo,* 275 U. S. 56 (pending suit in equity); *Hallowell* v. *Commons,* 239 U. S. 506 (same); cf. *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234; *Van Horne* v. *Hines,* 122 F. 2d 207 (App. D. C.) certiorari denied 314 U. S. 689. Upon the passage of the Revenue Act of 1943, appellant should have petitioned the Tax Court for redetermination, if it desired to continue its challenge to the Secretary's order.

c. The further contention that appellant would have forfeited its right to challenge the Act's constitutionality by prosecuting its remedy in the Tax Court is equally without merit. Appellant would be seeking no license, franchise, or special benefit from that court, but a redetermination from a tribunal with "essentially judicial procedures and experience" (*Aircraft* slip opinion, p. 15) that it had made no excessive war profits in 1942 and was accordingly free from the exaction which the Secretary's order imposed. Cf. *Oklahoma* v. *Civil Service Commission,* 330 U. S. 127, 139–140. It would be free to contest the Act's validity there, as others have done (cf. *Stein Bros. Mfg. Co.* v. *Secretary of War,* 7 T. C. 863, 876–882; *Aircraft* slip opinion p. 18, fn. 35), and it is clear that "no constitutional right could have been prejudiced by so doing." *St. Louis & R. Co.* v. *Public Comm'n,* 279 U. S. 560, 563; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588, 592. In the *Aircraft* and *Wade* cases, this Court required contractors vigorously attacking the statute to complete their Tax Court proceedings, and the Court certainly did not intend to set a trap for these litigants. Similar rulings have issued in the case of other statutes. *Newport News Co.* v. *Schauffler,* 303 U. S. 54, 56; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50; *United States* v. *Ruzicka,* 329 U. S. 287, 294; cases cited *supra;* cf. *Electric Bond Co.* v.

Comm'n, 303 U. S. 419, 435. Little need be said of appellant's second asserted "peril", that by petitioning the Tax Court it might commit final decision on the issue of constitutionality to an administrative tribunal. If Congress did not intend the Tax Court to have final judgment on that question, or if the Constitution requires further judicial review and consideration, appellant would be free to bring a proper proceeding in a "constitutional court". If, however, final decision on constitutional issues has been left to the Tax Court, and validly so, appellant can hardly claim for itself the privilege of a decision by another tribunal.

d. *Macauley, Aircraft,* and *Wade, supra,* have settled that, at least as to issues of amount, coverage, and statutory construction, the Tax Court has original exclusive jurisdiction; and appellant's failure to bring those issues to that tribunal constitutes a complete and final waiver. *Yakus* v. *United States,* 321 U. S. 414, 444–447. Even as to questions of the Act's constitutional validity, *Aircraft* and *Wade* hold that completion of Tax Court proceedings is an indispensable prerequisite to a judicial proceeding in equity, such as this, where the renegotiated contractor has other adequate remedies upon which to call. *Aircraft* slip opinion, p. 20. As we show below, if appellant were hereafter to be faced with a demand by the Government or by a withholding order, it would have its remedy by defense to the Government's

suit, action against a withholding contractor, or suit under the Tucker Act, as the case might be. There was, therefore, no excuse for appellant's failure to resort to the Tax Court proceeding which Congress made available to it and indicated that it should pursue.

2. *Appellant has an adequate remedy at law and will suffer no irreparable injury.* In the *Aircraft* and *Wade* cases, withholding orders had been issued against customers of the renegotiated contractors, and funds owing to them were actually being withheld, but this Court held that equitable intervention was unnecessary because a suit against the withholding customers offered a "completely adequate remedy at law" (*Aircraft* slip opinion, p. 27). Cf. *Coffman* v. *Breeze Corp.*, 323 U. S. 316. Here there exists neither such actual damage nor the threat of irreparable injury, and *a fortiori* equitable relief is unwarranted.

The United States has not ordered any of appellant's purchasers to withhold any sums, and the appellee, as Secretary of the Navy, has unequivocably stated to appellant that he does not propose to issue such withholding orders (Stipulation, Vol. III, pp. 152–153) *supra*, p. 2. Moreover, by this time it is very doubtful that the United States could collect, without considerable difficulty, any substantial portion of the claimed sum by ordering its contractors to withhold from appellant, even if it desired to do so. As for direct withholding of sums owed by the United

States to appellant, the total amount currently owing (if any is still unpaid) (*supra*, p. 7) is obviously far too small to satisfy the Government's claim or to disturb appellant more than slightly. It is clear that the only means really available to the United States for collection of the sum in controversy is by action against appellant to recover the debt, and in such a suit appellant may raise any defense to which it is now entitled, including the unconstitutionality of the Renegotiation Act. The probability of such a single action at law cannot, of course, be said to be irreparable injury warranting the intervention of equity.

In the unlikely event that the United States, contrary to Secretary Forrestal's statement, should order a contractor to withhold from appellant, and such contractor did so withhold, there would be available, as in the *Aircraft* and *Wade* cases, the adequate remedy of suit against such a contractor. Appellant contends that, unlike Aircraft, its customers number in the thousands and the amounts owed by them are small. But, here, as in Aircraft, the District Court has implicitly determined that "there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction", and appellant has not shown why it would be necessary to sue more than one of those of its customers to whom a withholding order might be issued "in order to secure a determination of its constitutional rights or

preserve its rights. A single test suit would serve the former purpose fully, and there are no allegations of fact sufficient to show that appellant's rights of recourse against others probably would be lost by awaiting the outcome of such a suit, either legally through the operation of statutes of limitations or practically * * * through any probable incidence of insolvency" (*Aircraft* slip opinion, pp. 25–26).[5]

3. ***This is a suit against the United States to which the United States has not consented.*** In present posture, it is clear that the only real controversy now in this case hinges on the small sums in the Treasury which may be owing to appellant and which the Government may possibly withhold at the conclusion of the litigation. Appellee has stated that no orders will be given to other contractors to withhold money due appellant; no such instructions have been given; and the Government has evinced no intention of rescinding its prior representation to appellant and of issuing such withholding orders in the future. Cf. *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371, 373, fn. 3. In these circumstances, the holding in *Mine Safety* is clearly applicable. There, a rene-

[5] It may also be noted that although the *Aircraft* case concerned an excessive profits determination for the fiscal year ending November 30, 1943, which was governed by the Second Renegotiation Act (Revenue Act of 1943, Title VII, 58 Stat. 21, 78), *Wade* v. *Stimson*, decided on its authority, involved a renegotiation determination for the year *1942*, just as does the instant case.

gotiation order had been issued and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the District Court to enjoin such withholding was held barred by the absence of the United States as a party, because the effect of the relief sought would be to compel payment of money from the Federal Treasury. Similarly, the present suit has now become "an indirect effort to collect a debt allegedly owed by the Government in a proceeding to which the Government has not consented." 326 U. S. 371, 375. Cf. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra* slip, opinion p. 9; *Land* v. *Dollar,* October Term 1946, No. 207, decided April 7, 1947, slip opinion p. 5.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed or, in alternative, that the judgment below be affirmed, pursuant to paragraph 3 of Rule 12 and paragraphs 3 and 4 of Rule 7 of this Court.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1947.

Copy received August 27, 1947.

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